Nos. 499-500.

In the Supreme Court of the United States

OCTOBER TERM, 1942

META BIDDLE ROBINETTE, PETITIONER

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

ELISE BIDDLE PAUMGARTEN, PETITIONER

v.

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ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT

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OPINIONS BELOW

These cases were consolidated for hearing and opinion in the Board of Tax Appeals and the court below. The opinion of the Board of Tax Appeals (R. 15–19) is reported in 44 B. T. A. 701. The original opinion of the Circuit Court of Ap-

peals (R. 37–42) and its opinion upon rehearing (R. 50–52) are reported in 129 F. 2d 832.

JURISDICTION

The judgments of the Circuit Court of Appeals were entered on March 23, 1942. (R. 42, 43.) Petition for rehearing, filed April 7, 1942 (R. 43), was granted April 21, 1942 (R. 48). On July 30, 1942, the court affirmed its previous order reversing the decisions of the Board. (R. 50–52.) The petition for writs of certiorari was filed October 29, 1942, and was granted December 7, 1942. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended.

QUESTION PRESENTED

Where the grantor of a trust provides that the income is to be paid to the grantor for life, then to two others for life, the property then to go to children, if any, when they reach twenty-one, or if none, then to testamentary appointees of the survivor of the grantor and the two other life tenants, is the settlor subject to gift tax under Sections 501 and 506 of the Revenue Act of 1932 upon the value of the remainder (after the life estate) at the time of establishment of the trust?

STATUTE AND REGULATIONS INVOLVED

The statute and regulations involved are set out in the Appendix to the Government's brief in *Smith* v. *Shaughnessy*, No. 429, present term, which is to be argued immediately preceding the instant case and involves similar issues.

STATEMENT

The Board of Tax Appeals found the following facts (R. 15–17):

Elise Biddle Paumgarten was, before her marriage, Elise Biddle Robinson. She is the daughter of Meta Biddle Robinette and the stepdaughter of Edward B. Robinette, all residents of Philadelphia, Pennsylvania. On January 6, 1936, when she was soon to be married, she and her mother and stepfather had a conference with the family attorney, looking to an assurance that her fortune would be kept within the family. It was agreed that if she would create a trust reserving life estates first in herself and then in her mother and stepfather, remainder over to her issue, her mother would make a similar trust and her stepfather would include similar provisions in his will. This was a concerted family arrangement for keeping their respective fortunes in the line of descent should there be issue of the daughter; or, should there be no issue, passing the family fortune under a power of appointment to be exercised by will by the last survivor of the three. Pursuant to this plan, the trust indentures were executed on January 14, 1936, by the mother and daughter in the presence of all three. The stepfather's will had been executed shortly before. (R. 15–16.)

Taxpayer Meta Biddle Robinette, who was then fifty-five years old, transferred property having a market value of $193,546 irrevocably in trust to

pay the entire income to herself for life, and on her death to her husband for life, and on his death, to her daughter for life. Upon the termination of the life estates, the trustees were to distribute the corpus to the issue of the daughter *per stirpes*, upon their reaching, respectively, the age of twenty-one, and, in default of such issue, then to such persons as the survivor of the three should by will appoint. (R. 16.)

Taxpayer Elise Biddle Robinson, who was then 30 years old, transferred property having a market value of $680,928.68, irrevocably in trust to pay the entire income to herself for life, and on her death to pay the income to her mother and her stepfather, in equal shares, and on the death of either, to pay the entire income to the survivor. Upon termination of the life estates, the trustees were to distribute the corpus to the issue of the grantor *per stirpes*, upon their reaching, respectively, the age of twenty-one, and in default of such issue, then to such persons as the survivor of the three should by will appoint. Elise Biddle Robinson was married in April of 1936 and now has issue. (R. 16.) At the same time, she also transferred other property, having a market value of $216,709.16, irrevocably in trust subject to substantially the same terms described above. (R. 17.)

The taxpayers' gift tax returns for the calendar year 1936, filed on March 15, 1937, disclosed the irrevocable trust indentures of January 14,

1936, and claimed there was no gift tax liability. (R. 17.)

The Commissioner determined that the life estates transferred to the husband and daughter were gifts by Meta Biddle Robinette, valued them at $57,958.40, and assessed a tax of $388.75 against her, which she paid about January 29, 1940. The Commissioner determined that the life estates transferred to the mother and stepfather were gifts by Elise Biddle Robinson, valued them at $48,635.52, and assessed a tax of $129.53 against her, which she paid about January 29, 1940. (R. 17.)

Thereafter, the Commissioner issued notices of deficiency, stating his determination that the remainder interests under each of the irrevocable trusts executed by them on January 14, 1936, were gifts, and determining an additional deficiency of $3,155.57 against Meta Biddle Robinette and $25,044.94 against Elise Biddle Robinson. (R. 17.)

The value of the remainder in the Meta Biddle Robinette trust was fixed by the Commissioner at $104,381.29, after applying the remainder factor, .53931 for age fifty-five, to the value of the property transferred, and the value of the remainder in Elise Biddle Robinson's trusts was fixed by the Commissioner at $274,829.78, after applying the remainder factor, .30617 for age thirty, to the value of the property transferred[1] (R. 17).

[1] The remainder factors, referred to above, were apparently taken from Regulations 79 (1936 ed.), Article 19, Table A, column 3.

Upon review the Board of Tax Appeals held (R. 17–19) that the remainder interests did not constitute taxable gifts but the court below reversed the decision of the Board (R. 37–43, 50–52).

ARGUMENT

The basic issue herein is substantially the same as in *Smith* v. *Shaughnessy*, No. 429, and we respectfully refer the Court to our brief in that case for a full presentation of our position. There are, however, two additional aspects to the instant cases that require further comment.

1. In *Smith* v. *Shaughnessy*, the donor retained a substantial reversionary interest, depending only upon his surviving his wife and capable of ascertainment by standard actuarial methods; we therefore conceded that the value of that reversionary interest might be excluded from the measure of the taxable gift. In the instant cases, on the other hand, the reversionary interests depend not only upon the possibility of survivorship (which probably could be computed by methods similar to those employed in the *Smith* case), but also upon death of the daughter without issue.[1]

[1] Actually, the condition was even more complex, for it involved the death of the daughter without issue who reached the age of twenty-one.

The instant trusts were clearly valid under local law even though the remainders were to go to persons unborn at the time the trusts were created. *King* v. *York Trust Co.*, 278 Pa. 141; *Lewis's Estate*, 231 Pa. 60; *Johnson* v. *Provident Trust Co. of Philadelphia*, 280 Pa. 255; *McCormick* v.

We know of no generally accepted actuarial methods whereby so remote a contingency can be computed.'

The relationship of these cases to the *Smith* case is analogous to the relationship between *Humes* v. *United States*, 276 U. S. 487, and *Ithaca Trust Co.* v. *United States*, 279 U. S. 151. In the *Humes* case, there was a bequest of property to a girl, then 15 years of age, to be distributed to her in specified portions upon her attaining the ages of 30, 35, and 40, respectively; and it was provided that if she should die without issue before attaining the age of 40, the undistributed principal was to be paid to charities. The question in the case was whether the decedent's estate was entitled to a charitable deduction measured by an estimated value of the charities' contingent interest in the property. The Court held that any valuation of that interest would be so speculative (in view of the condition that the primary legatee die without

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Sypher, 238 Pa. 185; *Ashhurst* v. *Given*, 5 Watts & S. 323 (Pa.); see also American Law Institute, Restatement of the Law of Trusts, Section 112, Comment d.

'The trusts herein were established in contemplation of the daughter's marriage, and it is the general rule that a woman is presumed to be capable of bearing children (*Sterrett's Estate*, 300 Pa. 116; *List* v. *Rodney*, 83 Pa. 483). The instant case presents no facts (*United States* v. *Provident Trust Co.*, 291 U. S. 272; *City Bank Farmers' Trust Co.* v. *United States*, 74 F. 2d 692 (C. C. A. 2d)), which would take it out of the general rule. Elise was 20 years old when the trusts were created, she was married a few months thereafter and children were in fact born to her.

issue", that Congress could not be presumed to have intended to allow the deduction in such circumstances.

In the *Ithaca Trust Co.* case, however, where a bequest was made to the decedent's wife for life, with remainder to charities, it was held that the charities' interest was sufficiently ascertainable to justify the deduction.*

The *Smith* case is comparable to the *Ithaca Trust Co.* case, for in each the remainder interest was capable of ascertainment by recognized acturial methods; we therefore conceded that the retained interest of the grantor may be excluded in the *Smith* case. The instant cases, on the other hand, are comparable to the *Humes* case, since the donors' contingent reversionary interests depend not only upon conditions of survivorship, but also upon failure to leave issue. Any attempt to value these remote interests would be, in the language of Mr. Justice Brandeis, "mere speculation bearing the delusive appearance of accuracy" (*Humes* v. *United States*,

* The bequest also authorized the wife to use any sum from principal "that may be necessary to suitably maintain her in as much comfort as she now enjoys." But the Court pointed out that the widow's right to take corpus was not left to her discretion; it was based upon an ascertainable standard "fixed in fact and capable of being stated in definite terms of money," 279 U. S. at 154. And since the property involved could produce more income than was sufficient to maintain the widow as required, the Court apparently felt that this factor could be disregarded.

at p. 494), and it therefore cannot be supposed that Congress intended such interests to be excluded in the computation of the gift tax liability.

Although the court reached a contrary conclusion with respect to a contingent interest that was similarly remote and conjectural in *Commissioner* v. *McLean*, 127 F. 2d 942 (C. C. A. 5th),[1] we submit that the case was erroneously decided in that respect. Moreover, the burden was on the taxpayer to prove what, if any, value should be accorded to the retained interest (*Hughes* v. *Commissioner*, 104 F. 2d 144, 147–148 (C. C. A. 9th)) and there is no basis in this record for overriding the Commissioner's determination. Here the Commissioner determined that the full value of the remainders, as computed by actuarial methods, should be included in the taxable gifts and the taxpayers have failed to overcome the presumption of correctness which attaches to such a determination. Cf. *Wickwire* v. *Reinecke*, 275 U. S. 101; *Reinecke* v. *Spalding*, 280 U. S. 227; *Burnet* v. *Houston*, 283 U. S. 223; *Fidelity-Philadelphia*

[1] In the *McLean* case the grantor reserved a possibility of regaining the property if he should survive his wife, his daughter, and any children and grandchildren of the daughter unless she should make a will disposing of the trust estate, in which event the trust estate was to go as her will directed. The court remanded the case to the Board with directions to evaluate that very remote interest and reduce the value of the gift accordingly.

Trust Co. v. *Commissioner*, 27 B. T. A. 972, 979–980.

2. In their brief on the merits, petitioners make the further contention that the transfers herein were not taxable because, in view of their reciprocal character, they were made "for an adequate and full consideration in money or money's worth" (Br. 7 *et seq.*). Although petitioners had raised this issue below, they did not present it in their petition for certiorari, and the Government's response to the petition, consenting to certiorari, accordingly ignored it. We submit, therefore, that under this Court's rules of practice, often restated, this issue is not open to petitioners.

Moreover, the point is wholly without merit. The statute contemplates the taxation of transfers for less than full and adequate consideration in money or money's worth. Revenue Act of 1932, Section 503; Treasury Regulations 79 (1936 ed.), Article 8. The trusts in these cases were the instrumentalities by which the grantors disposed of their property by way of gift. The gifts were none the less real because of the concerted action with respect thereto. Such arrangements do not detract from the essential quality of a transfer in trust (cf. *Lehman* v. *Commissioner*, 109 F. 2d 99 (C. C. A. 2d); *Commissioner* v. *Dravo*, 119 F. 2d 97 (C. C. A. 3d); *Commissioner* v. *Warner*, 127 F. 2d 913 (C. C. A. 9th)); or make that a sale which is in reality a gift. Cf. *Taft* v. *Commis-*

sioner, 304 U. S. 351. Certainly the taxpayers here have failed to sustain the burden of proving that the respective transfers were made for consideration which was adequate and full and for money or money's worth. Cf. *Commissioner* v. *Bristol*, 121 F. 2d 129 (C. C. A. 1st).

Although it may be assumed *arguendo* that the life estate which one donor gave the other could operate *pro tanto* to offset the life estate received from the other, there was no consideration in money or money's worth with respect to the remainder interests here in question.

CONCLUSION

The judgments of the court below should be affirmed.

Respectfully submitted.

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SUPREME COURT OF THE UNITED STATES.

Nos. 499 and 500.—October Term, 1942.

Meta Biddle Robinette, Petitioner, 499 *vs.* Guy T. Helvering, Commissioner of Internal Revenue. Elise Biddle Paumgarten, Petitioner, 500 *vs.* Guy T. Helvering, Commissioner of Internal Revenue.	On Writs of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

[February 15, 1943.]

Mr. Justice Black delivered the opinion of the Court.

This is another case[1] under the gift tax provisions of the Revenue Act of 1932, §§ 501, 506, which, while presenting certain variants on the questions decided today in *Smith* v. *Shaughnessy*, No. 429, is in other respects analogous to and controlled by that case.

In 1936, the petitioner, Elise Paumgarten (nee Robinson), ~~Biddle Robinson~~, was thirty years of age and was contemplating marriage; her mother, Meta Biddle Robinette, was 55 years of age and was married to the stepfather of Miss Robinson. The three, daughter, mother and stepfather, had a conference with the family attorney, with a view to keeping the daughter's fortune within the family. An agreement was made that the daughter should place her property in trust, receiving a life estate in the income for herself, and creating a second life estate in the income for her mother and stepfather if she should predecease them. The remainder was to go to her issue upon their reaching the age of 21, with the further arrangement for the distribution of the property by the will of the last surviving life tenant if no issue existed. Her mother created a similar trust, reserving a life estate to herself and her husband and a second or contingent life estate to her daughter. She also

[1] These two matters have been considered as one case below and will be so treated here.

assigned the remainder to the daughter's issue. The stepfather made a similar arrangement by will. The mother placed $193,000 worth of property in the trust she created, and the daughter did likewise with $680,000 worth of property.

The parties agree that the secondary life estates in the income are taxable gifts, and this tax has been paid. The issue is whether there has also been a taxable gift of the remainders of the two trusts. The Commissioner determined that the remainders were taxable, the Board of Tax Appeals reversed the Commissioner, and the Circuit Court of Appeals reversed the Board of Tax Appeals. 129 F. 2d 832.

The petitioner argues that the grantors have not relinquished economic control and that this transaction should not be subject both to the estate and to the gift tax. What we have said in the *Smith* case determines these questions adversely to the petitioner. However, the petitioners emphasize certain other special considerations.

First. Petitioner argues that since there were no donees in existence on the date of the creation of the trust who could accept the remainders, the transfers cannot be completed gifts. The gift tax law itself has no such qualifications. It imposes a tax "upon the transfer . . . of property by gift." And Treasury Regulations provide that "The tax is a primary and personal liability of the donor, is an excise upon his act of making the transfer, is measured by the value of the property passing from the donor, and attaches regardless of the fact that the identity of the donee may not then be known or ascertainable." We are asked to strike down this regulation as being invalid because inconsistent with the statute. We do not think it is. As pointed out in the *Smith* case, the effort of Congress was to reach every kind and type of transfer by gift. The statute "is aimed at transfers of the title that have the quality of a gift." *Burnet* v. *Guggenheim*, 288 U. S. 280, 286. The instruments created by these grantors purported on their face wholly to divest the grantors of all dominion over the property; it could not be returned to them except because of contingencies beyond their control. Gifts of future interests are taxable under the Act, § 504(b) and they do not lose this quality merely because of the indefiniteness of the eventual recipient. Tht petitioners purported to give the property to someone whose identity could be later ascertained and this was enough.

Second. It is argued that the transfers were not gifts but were supported by "full consideration in money or money's worth."[2] This contention rests on the assumption that an agreement between the parties to execute these trusts was sufficient consideration to support the transfers. We need not consider or attempt to decide what were the rights of these parties as among themselves. Petitioners think that their transaction comes within the permissive scope of Article 8 of Regulation 79 (1936 edition) which provides that "a sale, exchange or other transfer of property made in the ordinary course of business (a transaction which is bona fide at arm's-length and free from any donative intent) will be considered as made for an adequate and full consideration in money or money's worth." The basic premise of petitioner's argument is that the moving impulse for the trust transaction was a desire to pass the family fortune on to others. It is impossible to conceive of this as even approaching a transaction "in the ordinary course of business."

Third. The last argument is that "in any event, in computing the value of the remainders herein, allowance should be made for the value of the grantor's reversionary interest." Here unlike the *Smith* case the government does not concede that the reversionary interest of the petitioner should be deducted from the total value. In the *Smith* case, the grantor had a reversionary interest which depended only upon his surviving his wife, and the government conceded that the value was therefore capable of ascertainment by recognized actuarial methods. In this case, however, the reversionary interest of the grantor depends not alone upon the possibility of survivorship but also upon the death of the daughter without issue who should reach the age of 21 years. The petitioner does not refer us to any recognized method by which it would be possible to determine the value of such a contingent reversionary remainder. It may be true as the petitioner argues that trust instruments such as these before

[2] Section 503 of the 1932 Act, 47 Stat. 169, provides that "Where property is transferred for less than an adequate and full consideration in money or money's worth, then the amount by which the value of the property exceeded the value of the consideration shall, for the purpose of the tax imposed by this title, be deemed a gift, ..." This language is interpreted in the House and Senate Committee Reports as follows: "The tax is designed to reach all transfers to the extent that they are donative, and to exclude any consideration not reducible to money or money's worth." House Report No. 708, 72d Cong., 1st Sess., p. 29; Senate Report No. 665, 72d Cong., 1st Sess., p. 41.

us frequently create "a complex aggregate of rights, privileges, powers and immunities and that in certain instances all these rights, privileges, powers and immunities are not transferred or released simultaneously." But before one who gives this property away by this method is entitled to deduction from his gift tax on the basis that he had retained some of these complex strands it is necessary that he at least establish the possibility of approximating what value he holds. Factors to be considered in fixing the value of this contingent reservation as of the date of the gift would have included consideration of whether or not the daughter would marry; whether she would have children; whether they would reach the age of 21; etc. Actuarial science may have made great strides in appraising the value of that which seems to be unappraisable, but we have no reason to believe from this record that even the actuarial art could do more than guess at the value here in question. *Humes* v. *United States*, 276 U. S. 487, 494.

The judgment of the Circuit Court of Appeals is

Affirmed.

Mr. Justice ROBERTS dissents for the reasons set forth in his opinion in No. 429, *Smith* v. *Shaughnessy*.

A true copy.

Test:

Clerk, Supreme Court, U. S.